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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 407

IMMACULATE CONCEPTION CHURCH OF LOS ANGELES, LAKE CONGREGATIONAL CHURCH OF PASADENA, AND ELEVEN TEN BROADCASTING CORPORATION, PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–5a) is not yet reported. The decisions and orders of the Federal Communications Commission (J. App.[1] 380–406, 497–508) are reported at 32 F.C.C. 706 and at 33 F.C.C. 92.

[1] "J. App." refers to the printed joint appendix filed in the court of appeals.

## JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on July 5, 1963 (Pet. App. 5a). The petition for a writ of certiorari was filed on August 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 402(j) of the Communications Act of 1934, as amended, 47 U.S.C. 402(j).

## QUESTIONS PRESENTED

1. Whether Eleven Ten had reasonable notice of the issues of neglect and deception upon which the Commission based the denial of its application for renewal of a broadcasting license.

2. Whether the Federal Communications Commission may deny the renewal of a license on the ground that the licensee is disqualified by reason of attempts to deceive the Commission, without considering public service programing instituted by the licensee after it is given official notice that the renewal of its license is in doubt.

## STATUTES INVOLVED

Pertinent sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*; of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*; and of the Regulations of the Federal Communications Commission, 47 CFR 1.140, are set out in the appendix to the petition. (Pet. App. 5a-7a).

## STATEMENT

On December 22, 1958, Eleven Ten Broadcasting Corporation ("Eleven Ten"), wholly owned by Dow

and R. Cooke of New York City, applied for Commission consent to the assignment to it of standard broadcast station KRLA at Pasadena, California (R. 1855-1900).[1] Eleven Ten stated that KRLA would devote certain percentages of its broadcast time to religious, agricultural and educational programs (J. App. 310), that Donald Cooke would spend at least one-fourth of his time at Pasadena in the active operation of KRLA (J. App. 286), and that Donald Cooke's Canadian brother, Jack K. Cooke, would not participate in the ownership or control of KRLA (J. App. 285). The Commission granted its consent and Eleven Ten acquired KRLA on May 1, 1959.

On September 2, 1959, Eleven Ten filed an application for renewal of KRLA's license, which was to expire on December 1, 1959 (J. App. 1-7; R. 1-54). At the Commission's request, Eleven Ten submitted KRLA's program analysis and logs for the week of October 18-24, 1959 (J. App. 33-63). On December 16, 1959, the Commission wrote a so-called "section 309(b) letter" to Eleven Ten, stating that it was unable to find that a grant of the renewal application would serve the public interest, convenience or necessity (J. App. 79-81).[2] The Commission pointed out

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[1] "R. ——" refers to the record of the proceeding before the Commission, filed in the court of appeals. The "Tr." prefix to a record reference is to the original pagination of the hearing transcript in the record before the Commission, which was filed with the court below. These transcript pages were not renumbered in the court record.

[2] This letter was written pursuant to 47 U.S.C. (1958 ed. Supp.) to afford Eleven Ten the opportunity to inform the Commission of any reason why its application should not be designated for hearing.

that questions had arisen as to whether Eleven Ten was meeting its programing proposals, whether it had falsified KRLA's program logs, whether it had conducted a deceptive contest over KRLA, and whether Jack Cooke had improperly assumed control over KRLA.

Eleven Ten asked that it be given until February 15, 1960, to file its reply so that Donald Cooke could personally verify the information to be submitted (J. App. 82–83). On that date it submitted statements signed by Donald Cooke and his employees (J. App. 84–100), including new programming proposals (J. App. 102–124). Eleven Ten listed among its new programs two Sunday morning religious services which had been initiated on January 31, 1960: a Catholic High Mass from the Immaculate Conception Church of Los Angeles, and an hour-long Morning Worship Service from the Lake Congregational Church of Pasadena (J. App. 115).

On July 5, 1960, the Commission issued an order (J. App. 125–126) in which it stated that it was unable to find that a grant of Eleven Ten's application would serve the public interest, and that a hearing was required upon the following issues:

> 1. To determine whether, in light of its operations since it acquired Station KRLA, the licensee's program proposals contained in its application for Commission consent to assignment of the license of Station KRLA (then KXLA) (BAPL-171) were made in good faith;

2. To determine whether, in the light of the manner in which the "Find Perry Allen" contest was conducted by Station KRLA in and about September 1959, the licensee operated said station for improper purposes contrary to the public interest;

3. To determine whether the station's program logs for the week of October 18-24, 1959, were altered with the intent and purpose of deceiving the Commission;

4. To determine whether, since the date of assignment of license of Station KRLA (formerly KXLA) to the licensee, Jack K. Cooke, a Canadian citizen, has exercised control with respect to the operations of said station contrary to the provisions of Section 310 of the Communications Act of 1934, as amended, and the Commission's rules and policies promulgated thereunder;

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-entitled applications would serve the public interest, convenience or necessity.

Hearings were held at Los Angeles, California, from October 31, 1960, through November 9, 1960, and at Washington, D.C., on December 22, 1960.

### 1. THE EXAMINERS' FINDINGS

On April 21, 1961, the two hearing examiners assigned to the hearing issued their initial decision [1]

[1] Prior to the hearings, the Commission informed counsel for Eleven Ten that it would examine Eleven Ten's "Golden Key" contest as well as the "Perry Allen" contest specifically mentioned in this issue. [J. App. 531-532]

App. 281–345). They found that the Perry Allen and Golden Key contests had been conducted in a deceptive manner (J. App. 342); that KRLA's general manager, without Donald Cooke's knowledge, had altered KRLA's program logs for the purpose of deceiving the Commission (J. App. 343); that Eleven Ten had not adhered to its programing proposals, but that there was no evidence of bad faith at the time of its original submission (J. App. 340–341); and that, although Donald Cooke had asked his brother, Jack, to assume the duties of KRLA's program director in August 1959 (J. App. 295), Donald had not surrendered ultimate control of the station to Jack (J. App. 339). The hearing examiners concluded that the renewal of KRLA's license for a three-year term should be denied, but that it should be given a renewal for a one-year term (J. App. 343–345).

The pertinent factual findings made by the examiners (and sustained by the Commission, J. App. 392–403) were as follows:

(a) *Misrepresentation of programing proposals.*

Eleven Ten had proposed to broadcast farm market prices and other information of interest to farmers on every newscast 24 times a day; a one-hour program each week for a farm audience (J. App. 345); nightly programs on community service and education (J. App. 308–309); and religious programs for three and one-half hours on Sunday mornings between 6:00 a.m. and 12:00 noon (J. App. 308–309).

On October 2, 1959, Donald Cooke wrote to KRLA's program director that he regretted his proposal to include a farm report on each newscast, and that he

would like to remove the necessity of broadcasting religious programs in the 11:00 a.m. to 12:00 noon period on Sundays (J. App. 312–313). Donald Cooke and his staff then developed a plan whereby KRLA would broadcast only two 40-second agricultural newscasts daily rather than 24 (J. App. 314), and would meet the promise for a one-hour weekly agricultural program by broadcasting two 2-minute featurettes each day directed to housewives, listing the best buys in produce (J. App. 314–315). Eleven Ten also planned to claim credit for fifteen minutes of "public service" programing (education or community service) by inserting a single one-minute public service spot announcement in fourteen minutes of popular music (J. App. 313, 315). On October 15, 1959, KRLA's general manager advised the station's advertising sales representative that KRLA's weekday programing would be duplicated on Sundays (J. App. 315–316), thereby eliminating Sunday morning religious programs.

On February 15, 1960, in response to the "Section 309(b) letter," Eleven Ten submitted under oath, in the form of an amendment to its renewal application, program information which it asserted reflected the manner in which KRLA was carrying out its original representations to the Commission. The examiners and the Commission found that this amendment misstated the number, length and frequency of KRLA's agricultural programs during the period between October 1959 and January 1960 (J. App. 322–325).

Eleven Ten also proposed in this amendment extensive religious and educational programing for Sunday

mornings, and submitted letters from religious leaders expressing appreciation for this service (J. App. 115–122). Two months later KRLA's program director urged Donald Cooke to curtail this programing, and by memorandum dated April 12, 1960, Donald Cooke agreed that KRLA would be able to drop some of these programs, but cautioned that "No move should be made until about a month after the FCC has approved KRLA's request for its license renewal" (J. App. 325–327).

(*b*) *The contests*

KRLA broadcast two contests in early September, 1959. In the Perry Allen contest, Eleven Ten offered a prize beginning at $10,000, and decreasing by $1,000 per day, to the first person who would find and identify Perry Allen, a newly hired disc jockey for KRLA (J. App. 299–303, 382). KRLA broadcast clues encouraging its listeners to search for Perry Allen in Los Angeles. However, Perry Allen, as the station knew, was in Buffalo, New York, at the time (J. App. 301–303). Donald Cooke authorized this contest to begin, knowing that Perry Allen could not be in Los Angeles until September 12, 1959 (J. App. 330–331).

In the Golden Key contest, KRLA offered a prize beginning at $50,000 and progressively decreasing to $5,000, to the first person who could find a hidden Golden Key to the station's new 50 kw transmitter (J. App. 297–299). KRLA broadcast clues for finding the Golden Key which were meaningless, having been written by a station employee who did not know where the key was hidden. For publicity purposes, Eleven Ten planned to have the key found on Labor

Day. The key was found on that day after the clues to its location were made obvious, and the prize had been reduced to $5,000 (J. App. 298–299).

*(c) Falsification of program logs*

In assembling KRLA's program logs for the week of October 18–24, 1959, for submission in response to the Commission's request, the general manager found that the logs listed no religious programs. Without the knowledge of Donald Cooke who was absent, he directed a station employee to insert into the log for each day two minutes of religious programing (J. App. 333–335), although such programing had not been broadcast. The falsified logs were filed with the Commission on November 12, 1959, and, despite the Commission's prompt challenge of their accuracy, the employees of KRLA withheld the facts on the falsification until several weeks before the commencement of the hearings on October 31, 1960 (J. App. 336).

*(d) Failure to maintain control*

Donald Cooke attempted to manage KRLA from New York City. During the first three months of his ownership, he spent only one week in Los Angeles, and in the total period of seven and one-half months prior to the Commission's Section 309(b) letter he was there only four weeks (J. App. 293). Donald visited KRLA during the second and third weeks of August 1959 but did not remain because of "personal reasons." Before leaving he told his brother, Jack, that KRLA was a "mess" and asked him to take over the duties of KRLA's program director (J. App. 293, 295). The falsification of KRLA's program

logs and the Golden Key and Perry Allen contests took place while Donald Cooke was away from the station (J. App. 296–300). At the hearings, Eleven Ten submitted numerous copies of correspondence between Donald Cooke and his staff to show that he was maintaining responsible control over KRLA despite his long-term absences from the station (J. App. 137–207).

### 2. THE COMMISSION'S DECISION

The Commission unanimously determined that Eleven Ten's renewal application should be denied (J. App. 380–406). It affirmed the findings of the examiners with respect to the contests and the falsified program logs, stating that the two contests were "fraudulent in the sense that various clues which were broadcast over Station KRLA, were deceptive, and knowingly so"; and that "the only possible purpose of the alteration [of the program logs] was to deceive the Commission" (J. App. 382). In response to the contention that the principal owner of Eleven Ten was unaware of these improprieties, the Commission stressed that this argument reflected an impermissible view of a licensee's responsibilities, which cannot be delegated. The licensee has "a fundamental obligation" to retain "effective control * * * of the station's management and operation" (J. App. 383).

The Commission then reviewed Donald Cooke's activities with respect to Eleven Ten, finding that he failed to exercise proper responsibility (J. App. 383–384), and that, in any event, he countenanced other misrepresentations and evasions about the station's

programing schedule (J. App. 384–388). The Commission concluded (J. App. 389–390):

> The ultimate question posed by the hearing issues is whether a renewal of Eleven Ten's license is in the public interest. In view of the evidence adduced pursuant to the hearing issues, the conclusion is inescapable that responsible management was not characteristic of Eleven Ten's operation of Station KRLA. In its early stages, Donald Cooke failed to maintain effective control of the station's operation and delegated actual control to his brother Jack and to station employees, and during that period the Perry Allen and the Golden Key contests were conducted and the station's logs were altered. * * * After Donald Cooke assumed a greater interest in the details of station operation, he demonstrated a willingness to connive with station employees in various schemes to hoodwink the Commission into believing that KRLA's programing conformed with its program proposals. * * * This record of neglect on the one hand, and of efforts to mislead the Commission, on the other hand, disqualifies Eleven Ten from being a licensee of the Commisssion, and its applications will, therefore, be denied. A willingness to deceive a regulatory body, even as to matters unimportant in themselves, warrants denial of a renewal application. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223.

The Commission also denied Eleven Ten's request that the record be reopened to receive evidence of KRLA's programing subsequent to the hearing (J.

App. 390). Subsequently, the Commission denied a petition for reconsideration and/or reopening of the proceeding (J. App. 406–409), in which Eleven Ten asserted that the Commission had reached its ultimate conclusion upon the basis of issues with respect to which the licensee had not had proper notice (J. App. 497–507).

The Commission also denied petitions for rehearing filed by two churches (joint petitioners herein) to which Eleven Ten had donated free broadcast time following its receipt of the Section 309(b) letter (J. App. 489–496). The Commission stated that it had previously considered the religious programing of KRLA, and that such programing did not outweigh the considerations underlying the conclusions reached by the Commission (J. App. 507–508).

The Commission stayed the effectiveness of its order pending judicial review. Separate appeals were filed by Eleven Ten and by the two churches, and were consolidated by the court of appeals.

### 3. THE COURT OF APPEALS DECISION

The court of appeals affirmed (Pet. App. 1a–5a). It rejected Eleven Ten's contention that the Commission relied on matters "outside the specific issues under which the hearing was held," stating (Pet. App. 4a):

> * * * We read the Commission's decision as founded on the "conclusions that Donald Cooke is guilty of efforts to mislead the Commission" and that his willingness to deceive the Commission warrants denial of KRLA's renewal

> application. The facts marshalled in support of the Commission's ultimate factual conclusion are fairly encompassed within the first and third issues and constitute substantial evidence of record in support of that conclusion. The Commission's disqualification of Eleven Ten is within the discretion committed by Congress to the Commission. *Federal Communications Comm'n* v. *WOKO, Inc.*, 329 U.S. 223, 227–29 (1946). * * *.

The court also rejected the contention of Eleven Ten and of the churches[*] that the Commission erred in failing to make findings as to KRLA's public service programing. It held (Pet. App. 4a):

> * * * The Commission need not consider the public service rendered by a station where the licensee is disqualified by its attempts to deceive the Commission. *Federal Communications Comm'n* v. *WOKO, Inc.*, *supra*; *Independent Broadcasting Co.* v. *Federal Communications Comm'n*, 89 U.S. App. D.C. 396, 193 F. 2d 900 (1951), cert. denied, 344 U.S. 837 (1952).

## ARGUMENT

1. Eleven Ten's main contention is that the Commission's Notice of Hearing failed to specify with particularity the issues (the exercise of responsible control and the practice of deception) on which the

[*] Since the appeals of Eleven Ten and of the churches had been consolidated, and since the churches' appeal presented no additional issues for its decision, the court did not think it necessary to decide whether or not the churches had standing by reason of KRLA's broadcast of their Sunday services without charge (Pet. App. 4a, n. 3). The Commission had challenged the standing of the churches to seek judicial review.

case was decided, and that it was thereby deprived of a fair hearing guaranteed by the Communications Act and the Constitution. The short answer is that Eleven Ten had adequate notice and opportunity to prepare and present its case on these issues and that no more is required. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349–350 (1938); *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 36 (C.A.D.C., 1950); *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 841–842 (C.A.D.C.); *Brahy* v. *Federal Radio Commission*, 59 F. 2d 879, 880 (C.A.D.C.); cf. *Northwestern Bell Telephone Co.* v. *Nebraska Railway Commission*, 297 U.S. 471, 475–477; *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 578–581.

In fact, a review of the proceedings shows that Eleven Ten defended the case on a ground which necessarily raised the issue (already presented in part in the Notice of Hearing) of Donald Cooke's exercise of responsible control. Now it is complaining because its argument was considered by the Commission but did not result in the grant of its license. A litigant cannot raise issues in the course of proceedings and then complain of lack of notice when they are decided against it. Section 309(b), on which Eleven Ten rests its case, requires only that the licensee be adequately apprised of the issues he must meet. "Designations for hearing, like pleadings under modern procedure, are for the purpose of reasonably apprising the party of the issues involved, and are not to be struck down for non-prejudicial deficiencies"

(*Mansfield Journal Co. v. Federal Communications Commission*, 180 F. 2d 28, 36 (C.A.D.C.)). See *Kuhn v. Civil Aeronautics Board*, 183 F. 2d 839, 841-842 (C.A.D.C.), where the court held that so long as the petitioner there had actual notice of the issue in question as early as the release of the examiner's initial decision, and thereafter litigated that issue, he could not subsequently challenge the propriety of the Board's consideration of the matter.

The question of Donald Cooke's exercise of responsible control over KRLA's operations was squarely tendered by petitioner itself. Thus, Eleven Ten essentially conceded the contest chicanery and programming falsifications charged in issues two and three, but asserted in mitigation that its principal had not been aware of these improprieties. The Commission accepted the fact of Cooke's unawareness, but not in mitigation. Rather, the Commission reasoned that it showed Cooke had failed to exercise responsible control as he was required to do by the statute.

The turn of events was no surprise. It is clear from the hearing proceedings that Eleven Ten appreciated that this defense based upon Donald Cooke's lack of knowledge of serious misconduct in running the station necessarily raised the question whether he had managed the station in a responsible manner. Eleven Ten adduced a large quantity of evidence in an attempt to show that, although he was an absentee owner, Donald Cooke was nevertheless making every effort to maintain responsible control (J. App. 137–207). Numerous proposed findings (R. 799–808) designed to show his effective control were also submitted.

With respect to the Commission's finding that the licensee had engaged in deception, issue one gave notice that the Commission would question whether the licensee's original programming proposals had been made in good faith and in answering this question would consider "its operations since [it] acquired Station KRLA * * *." To review these operations, the Commission necessarily considered the report of programming which Eleven Ten submitted in response to the 309(b) letter as well as its intention to adhere to the program schedule outlined therein. Eleven Ten cannot claim surprise because the Commission's review showed that its report was purposely deceptive and that, as to public service programs shown in its schedule, it had plans to curtail them once its license renewal was granted.

During the hearing, Eleven Ten did not object to the introduction of evidence as to the misconduct of Donald Cooke and others in 1959 or 1960, as being irrelevant, and it indicated that it understood that the basic issue went to the matter of its good faith throughout the period considered by the Commission by proposing the following conclusion to the hearing examiners (J. App. 269):

> * * * The evidence establishes that nothing has been done which impugns the character, intent or motive of the licensee * * *.

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Conversely, the Commission's Broadcast Bureau joined issue by proposing the opposite conclusion (J. App. 279):

> * * * the evidence demonstrates that Eleven Ten, as a licensee has been shown to have a proclivity for knowingly furnishing false and misleading information to the Commission. * * *.

The notice requirement does not mean that the Commission must overlook acts of deception which come to light in the course of an inquiry already concerned with that problem, where the issues place the party on notice that the probity of its conduct is in question. Thus, the Commission was not required to issue a new notice of hearing to designate the question whether Eleven Ten had attempted to mislead the Commission by the material submitted in the course of the inquiry into whether the station had submitted false logs and been operating in violation of its commitments. The truthfulness of a licensee quite obviously is a condition to be demanded at all times. In addition, of course, such truthfulness was, under the circumstances here, properly comprised within the fifth issue stated in the notice which was "To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant" of the application would serve the public interest, convenience or necessity.

It is plain that Eleven Ten had ample notice and opportunity, of which it took advantage, to present and litigate the matters on which it now claims surprise. No more was required to satisfy the requirement of a fair hearing.

2. Eleven Ten also contends that the Commission erred in failing to give consideration to the loss of Sunday religious programming which the public would

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The facts stated above (*supra*, pp. 5-10) afford a complete answer to petitioner's suggestion that the record fails to support the Commission's conclusion that Donald Cooke had attempted to deceive the Commission.

sustain upon the denial of its license renewal. The Commission did consider KRLA's public service and religious programming in the period prior to the time the Commission questioned the licensee's qualifications (J. App. 504–506), and was fully justified in refusing to give any consideration to the programming which the licensee instituted a month and a half after its receipt of the 309(b) letter indicating that renewal of its license was in doubt. As the Commission stated in its opinion (J. App. 390–391):

> It [Eleven Ten] was disposed to deceit in advance of any Commission inquiry; it was disposed to deceit at the time of the Commission inquiry; it was disposed to deceit in the programming it would present after renewal of its license. In view of this continued pattern of deception, a meritorious programming farce, which may have been presented while the disposition of its renewal application was still in doubt, does not provide any assurance that such deception would not subsequently be resumed.

Petitioner suggests (Pet. 15–18) that *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, is to the contrary, or that it needs "clarification" to the extent it holds that the Commission need not consider a licensee's past service to the public where the licensee is guilty of misrepresentations. This contention ignores the plain and salutary principle of *WOKO* that where a licensee proves himself unfit, the Commission may insist upon a return of the license so that it may be issued to one who will be trustworthy in addition to providing an adequate

nicature of public service programming. Since the Commission here refused to consider only that part of KRLA's programming instituted by KRLA after its renewal was called into question (J. App. 390-391, 504-505), finding that improvement at that time did not provide assurance of operations in the public interest in the future, the holding of *WOKO* that past programming need not be weighed against misrepresentations is *a fortiori*. As the Court emphasized in that case (329 U.S. at 229):

> It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public. But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. * * *

See also *Federal Communications Commission* v. *Broadcasting Service Organization*, 337 U.S. 901, (1949) reversing *Broadcasting Service Organization* v. *Federal Communications Commission*, 171 F. 2d 1007 (C.A.D.C., 1948).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1963.